CONSTITUTIONAL RECOGNITION OF LOCAL GOVERNMENT

ADDRESS BY THE HONOURABLE JAMES SPIGELMAN AC

LOCAL GOVERNMENT ASSOCIATION OF QUEENSLAND

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Next week will mark a significant staging point in the decades old campaign by local government representatives throughout Australia for the recognition of local government in the Australian Constitution, the foundational political and legal document of this nation. Probably everyone at this Conference hopes that it will prove to be not merely a staging point, but a turning point.

As I am sure you are aware, Simon Crean, the Commonwealth Minister with responsibility for Local Government, will move a motion in the House of Representatives for the appointment of a Joint Select Committee on Constitutional Recognition of Local Government. The focus of the motion is financial recognition of local government by amending section 96 of the Constitution to extend the existing power of the Commonwealth to make financial grants to the States by adding local government.

The motion makes express reference to the findings of the Expert Panel on Constitutional Recognition of Local Government which I chaired. I suspect I was selected because I had no form on the issue or skin in the game. Other members of the Panel had many years of experience in local government affairs.

My education was swift, not least at the hands of your retiring President, Paul Bell, whose major contribution to the deliberations of the Panel I wish to acknowledge publicly here today.

As is clear from our Report, the members of the Panel were overwhelmingly in favour of financial recognition. It was the only

viable option with reasonable prospects of success. We rejected other forms of recognition, including mere symbolic recognition by inclusion in a new Preamble or the like. We formed the judgment that the Australian people would not vote in favour of a proposal that made no practical difference.

However, the Panel divided on the time frame within which financial recognition should be pursued. That difference of opinion is reflected in the motion to be considered by the House of Representatives next week.

The proposed Joint Select Committee is specifically directed to assess the prospects of success of a referendum, particularly in the light of the level of support within the Commonwealth Parliament and amongst State and Territory governments. These are the matters on which different views were held by members of the Panel and they remain significant considerations. I will return to these issues. The Joint Select Committee will also be asked to assess the preconditions set out by the Panel for the holding of a referendum

The Panel conducted its investigations and made its report in parallel with a second Panel, concerned with the recognition of indigenous Australians in the Constitution. The Government has announced that the recommendations of that Panel will not be placed before the people for a referendum at the time of the next election. The creation of the Joint Select Committee, assuming it proceeds on Minister Crean's motion, makes it feasible for Constitutional recognition of Local Government to proceed at that time. Whether that happens depends on the Joint Select Committee.

Perhaps some of you are frustrated that the majority recommendation of the Expert Panel wasn't simply put into legislative form, without a further enquiry. After all, all three political parties and the independents were represented on the Panel. Further, one of our most important tasks was to consult with the political leadership of the major parties at both Federal and State levels, which we did.

The appointment of such a Joint Select Committee to consider the report of the Panel and to further develop and refine the proposed amendment, was a specific recommendation in the submission to the

Panel by the Australian Local Government Association ("ALGA"). The majority report of the Panel expressly adopted this recommendation.

ALGA had hoped that this further Committee process would have occurred early in 2012. The delay is not such that it is now not feasible to hold the referendum with the next Federal election. It will, however, affect the campaign for a "Yes" vote to which the local government community, led by the State and National Associations, is committed.

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In the current climate, it is important not to underestimate the significant role of Parliamentary deliberations on this issue. The dynamics of a lower house in which no political party has a clear majority, feeding into political confrontation between the two major parties which, in the view of many observers, is more acrimonious than usual, may make achieving consensus position on the proposed amendment more difficult.

The provision for amendment of the Australian Constitution, in section 128, places Parliament at the heart of the process prior to any referendum. There are several specific requirements that do not apply to ordinary legislation and it is appropriate to remember them.

First, each house of Parliament must pass a Referendum Act by an *absolute* majority. Any abstention has a significant effect, which does not happen with ordinary legislation.

Secondly, there are time restrictions. A referendum must be held not less than 2 months, and not more than 6 months, after the legislation is passed.

Furthermore, there are detailed provisions, including time provisions, as to what will happen if only one House passes a law and the other does not.

Most significantly, it is generally acknowledged – based on our long history of failed referenda - that no referendum to amend the Constitution has any prospect of succeeding without the support of the major political parties. The consultations by the Expert Panel indicated that this would be forthcoming at a national level. There

were, however, considerable differences as to the enthusiasm with which the referendum was likely to be embraced. It was reasonably obvious to me that the parliamentarians from Queensland were, in fact, amongst the most enthusiastic supporters of the idea. Opponents were particularly concentrated in Western Australia and, with less fervour, in Victoria.

Although the Panel conducted some public meetings and consulted most of the party leadership at both Commonwealth and State levels, there is no doubt that much more can be done, and needs to be done. A Joint Select Committee is an appropriate mechanism for achieving consensus and expanding the base of support.

There is a further consideration which requires Parliamentary involvement at this stage. The Panel made, as a condition of its recommendation, the adoption of the ALGA submission requiring significant changes to the way Constitutional referenda are conducted and financed. These are amongst the matters to be considered by the Joint Select Committee. They clearly require Parliamentary consideration. These are not matters about which the Panel consulted with the political leadership, at either a Commonwealth or State level. Our consultations focused on the kind of recognition that may be acceptable. We did not consult about important matters which the Panel came to regard as preconditions for a successful referendum.

We do not know what level of consensus there may prove to be on these matters. They are quite significant changes. They overlap to a very substantial degree with the recommendations of the same character made by the Expert Panel on the Constitutional Recognition of Indigenous Australians.

The first of the ALGA recommendations accepted by my Panel was the adoption of recommendations made by the Parliamentary Inquiry into the Machinery of Referendums. It is now three years since that Parliamentary Committee reported. The Commonwealth is still considering a response to this Report. The Special Minister of State, Gary Gray MP, has carriage of the matter.

One of that Inquiry's recommendations was for a nationally funded education campaign on the Constitution generally, which should precede any further amendment of the Constitution. There does not

appear to be enough time, between the report of the new Joint Select Committee and the next election, for that to happen.

Another significant change in past referendum practice is the adoption by my Panel of the recommendation of the Parliamentary Inquiry that the legislative limit on spending on referenda should be removed. In addition, the Panel adopted the ALGA recommendation that funds for the "Yes" and "No" cases should be apportioned on the basis of Parliamentarians voting for and against the Referendum Bill, and that the level of expenditure be equivalent to that provided for election.

These are major changes in traditional practice with respect to Constitutional referenda. They are matters which require consideration by the Government and by the Opposition and other parliamentarians. I repeat, the Panel did not consult across the political leadership on these recommendations by ALGA. I do not know what ALGA itself may have done, before or since. However, the Panel came to the conclusion, and the Joint Select Committee is now asked to assess, whether these recommendations are essential to the conduct of a successful referendum.

As I have indicated, these recommendations overlap significantly with those made by the Indigenous Recognition Panel. When considering this aspect of its terms of reference the new Joint Select Committee may be influenced by submissions from those significant sections of the community which strongly advocate indigenous recognition, albeit it now appears, on a longer time horizon than local government recognition. It is in the interests of the local government community to engage that support, which is broadly based and influential. They should be encouraged to make submissions to the new Joint Select Committee, on the basis that this may establish the precedent for a future referendum on Indigenous recognition.

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The second precondition proposed by the Panel is, if anything, even more fraught. We recommended that the Commonwealth negotiate with the States to achieve, I emphasise to achieve, their support for financial recognition. This is a big ask.

The Panel met with most Premiers and State Leaders of the Opposition and their divergent views are set out in our Report. The only unequivocal hostility came from the government of Western Australia. Victoria also expressed opposition, but it was less forcefully put. Many other responses can only be described as luke warm, if not equivocal. It is possible to carry a referendum in the face of opposition on the part of some State leaders, but it is much more difficult. A referendum can be passed even if the people of two States vote "No", but if three say "No", it does not matter that a national majority says "Yes".

Neither in the ALGA submission, nor in the Panel's Report, is there any proposal about how the Commonwealth can achieve the support of the States for financial recognition. No doubt, some have in mind the traditional means by which the Commonwealth gets its way - by writing a cheque. I am by no means certain that that is an option in the current fiscal environment. I am, however, certain that a Joint Select Committee is not the forum for any such negotiations. If the local government community wishes to pursue this issue it will have to do so in other forums, particularly COAG.

If a 2013 referendum is still the target, the process of engaging the States will have to proceed in parallel with the deliberations of the Joint Select Committee. ALGA and the State Associations had done a lot of work on State leaders before the Panel was appointed. Our process did not affirm all prior promises of support. This remains a work in progress and should be regarded by supporters of the referendum as a high priority, which is unlikely to be achieved by the Joint Select Committee process.

Whether or not to proceed with the referendum in the face of hostility from State Governments is a political judgment, which the report of the Joint Select Committee will no doubt inform. It became reasonably clear, in the course of my Panel's consultations that, because of the strong opposition of the Western Australian government, no one expected the referendum to carry in that State. On the other hand, the institutional strength of local government here in Queensland, as manifest in the work of this Association, indicates significant support for the idea, notwithstanding, the traditional similarity of attitudes between Western Australia and Queensland about what used to be called States' rights.

It is essential to bear in mind how difficult it is to carry a referendum to amend the Australian Constitution. It has to be both a national majority - which requires majorities or very close votes in New South Wales, Victoria and/or Queensland - and a majority in at least four States. It is for others to make the political judgment involved. However, success in Tasmania may prove difficult and that, effectively, makes South Australia the swing state.

The failure of the referendums in 1974 and 1988 suggests that the major problem is getting a majority anywhere. In 1974, where the question was very similar to the form of financial recognition now proposed, the national vote in favour was 46.85%, with a majority only in New South Wales. In 1988 the national vote in favour was only 33.62%, and no State had a majority. However, those two referenda were complicated by multiple proposals for constitutional change. Local government could not get any clean air.

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The task ahead of you is a formidable one. The Expert Panel was impressed by the commitment of the local government community throughout Australia, in accordance with the long-range plan developed by ALGA, to devote resources and actively campaign for a "Yes" vote in a referendum. Without such commitment there would simply be no chance.

Although the public consultations by the Panel were not extensive, we came across little in the way of public engagement with the issue, other than from local government representatives who attended our public meetings. I do not put this in any way as indicating a lack of public support. What we did was too limited, both in terms of time and geography, to draw any such conclusion. However, even this limited experience does suggest that there is a lot of work to be done to engage the public in a positive way.

The policy of ALGA, adopted almost unanimously by the local government community throughout Australia in their submissions to the Panel, focuses on the practical significance of financial recognition. As I have said, there has to be a real purpose for Australians to accept a change to the Constitution. Financial recognition is of this character.

The ALGA campaign and the Panel Report accepted that there was a very real doubt about the constitutional validity of existing direct grants by the Commonwealth to local government. Such grants have become an essential component of the capacity of local government to fulfil its significant public responsibilities.

As the Panel Report noted, there is a tension between accepting local government as an instrument of national policy in any manner the Commonwealth decides, on the one hand, and the traditional subordination of the activities and powers of local government to State decision-making, on the other hand. However, we have now had several decades in which such grants have expanded both in amount and categories. There is a considerable body of actual experience of successful partnership amongst the three levels of government that has not undermined the fundamental constitutional responsibility of the State Parliaments for the respective systems of local government created in each state.

It was in recognition of this responsibility that the formulation of the Constitutional amendment proposed by the Panel adds to the existing language of section 96 of the Constitution, which empowers the Commonwealth to make grants to the States, a power to make grants to local government, with express reference to the States' traditional authority over local government, in the following terms:

"The parliament may grant financial assistance to any State *or to any local government body formed by State or Territory Legislation* on such terms and conditions as the Parliament sees fit".

The italicized words constitute the whole of the proposed amendment. As long as you can engage the attention of the public, this amendment has the inestimable advantage of simplicity.

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Until recently, the Commonwealth asserted its constitutional ability to make grants to local government, in effect, without restriction as to subject matter. Notwithstanding several defeats in the High Court, it seems to continue to do so. The Panel accepted the preponderant view amongst constitutional lawyers, that there is a very real doubt about the Constitutional validity of any direct financial grant

program that does not fall under a head of Commonwealth legislative power.

A particular focus of concern of the local government community, a concern which I regard as very real, has been the Roads to Recovery Program. These direct grants are of great significance to the financial sustainability of councils throughout Australia, particularly those outside metropolitan areas. The program is found in one Part of the Commonwealth's Nation Building Program (*National Land Transport) Act* 2009. Other programs in that Act clearly have a national focus and are constitutionally valid. The Roads to Recovery program is not of that character. In my opinion it is, more probably than not, Constitutionally invalid. Obviously, the Commonwealth's lawyers believe otherwise, or are at least prepared to argue otherwise with a straight face. However, the preponderance of Constitutional legal opinion is that there is a real risk to the program as presently constituted.

At the time the Panel reported, the Constitutional risks were unequivocally established in the 2009 decision of the High Court in the *Pape* Case. However, the Commonwealth's legal advisers continued to assert a wide-ranging basis for the Commonwealth's ability to make grants, despite the clear indications of the High Court's attitude. The Panel's attention was drawn to the submissions that the Commonwealth had made in other proceedings in the High Court known as the *Chaplaincy* Case. I chose to describe those submissions as "aspirational". I was trying to be polite. In any event, when the decision in the *Chaplaincy* Case was handed down in June, the High Court made it clear then it had meant what it said in *Pape.*

Unless the constitution is amended, the Commonwealth has no general power to make grants to local government. It can only make such grants in the exercise of a specific head of Commonwealth legislative power.

The Commonwealth's reaction to the recent a High Court decision was to enact emergency, omnibus legislation purporting to give legislative authority, for the first time, to over 400 different Commonwealth expenditure programs. The nature of this legislation basically gave the Executive the power to do what ever it wanted, in the same way as the Commonwealth's rejected submissions about

the scope of the Executive power in the Constitution had done. I will have some more to say about that in a moment.

The *Financial Framework Legislation Amendment Act (No. 3)* 2012, set out in Part 4 a long list of grants of financial assistance to "persons other than a State or Territory". Interestingly, Part 2 entitled "Financial assistance to a State or Territory" is empty, with an annotation "Reserved for future use". In the future, for any program which is found to be invalid, a regulation can quickly be made to move the program from the direct grant to a third party Part of the Act into the grant to a State or Territory Part, subject to conditions that it be passed on to the original recipient.

A number of local government grant programs are listed amongst the 400+ programs, including, for example, the Local Government Energy Efficiency Program. Most of the programs listed in the relevant Schedule are specific. However, some are identified in such a general language that they could not withstand constitutional scrutiny.

The "programs" of the Department of Regional Australia, are amongst those stated in the most general terms. Unlike other Departments, Regional Development did not specify individual programs. For example, in terms of what may interest local government, there is no specific identification of the Regional Development Fund. The program identified in the Act as 421. 002, is simply stated as "Regional Development", in the same broad terminology – for example, "Local Government" or "Sport and Recreation" - as applies to each of the other functions of that Department. I don't know what such a "program" is. I doubt, if it were ever tested in Court, that this broad-brush approach has any legal effect.

It could well be that the Regional Development Fund has a better chance of surviving a Constitutional challenge than some other financial assistance programs. These matters, if they ever get to Court, will have to be determined on a case-by-case basis. So far, the legislation does not do the job in this case. However, the omission can be cured by regulation and, perhaps, that is what is intended. That is a job that needs to be done. In my opinion, the specific programs of this Department are travelling naked.

This protective legislation extends only to Commonwealth grant programs that did not have a prior legislative basis. Accordingly, it

did nothing to provide additional protection for the Roads to Recovery program which, as I have mentioned, is already contained in legislation. The Commonwealth position remains that the *National Land Transport* legislation is valid in all respects and, accordingly, did not require the additional protection of the recent legislation.

The Commonwealth appears to be proceeding on the basis that as long as it has an arguable Constitutional case, it can still do whatever it likes. This may be because it is overwhelmingly probable that these programs will never be challenged in Court. If that is right, it disturbs me. I think the High Court may well be disturbed too.

It is difficult to see anybody being able to challenge the Roads to Recovery program, on the basis of the present High Court approach as to who has the right to institute a constitutional challenge. Brian Pape only had standing because the Commonwealth wanted to give him some money and he objected on principle to receiving money, which he thought was illegal. Most people who are offered money don't do that. In the *Chaplaincy* case, the plaintiff who brought the proceedings would probably not have been allowed to do so, except for the intervention of some States.

There is no doubt that any State has standing to challenge any of these programs. There may be a political cost in doing so. However, if any State, either alone or in combination with other like-minded States, concludes that the size of all of this has gone too far, it could compile a list of what it regards to be the most Constitutionally vulnerable programs and launch a broad-based challenge with a view to forcing the Commonwealth to return to using conditional grants to the States under section 96 and, thereby, deal the States back into the negotiation and administration of a wide range of programs. The States that intervened in the *Chaplaincy* case could well be emboldened by their success – a rare one on such issues.

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For decades the Commonwealth has had a dream run in the High Court, particularly with respect to the expansion of Commonwealth power at the expense of the States. In the context of the expansive, indeed in substance untrammelled, extent of the Executive power for which the Commonwealth contended, it may be in danger of giving

the High Court the impression that the Commonwealth intends to keep bringing the same point back, until the High Court gets it right.

For decades the Commonwealth executive got used to acting on the assumption that it could spend money on whatever it liked. When the High Court said, quite clearly, in *Pape,* that whatever the limits on Executive power might be, it was not that broad, the Commonwealth basically ignored that indication in submissions on the next occasion the matter arose in the *Chaplaincy* case.

When the Court dismissed the arguments again, the Commonwealth proceeded to virtually replicate its view of the Executive power in the form of a statute. The amendment to the *Financial Management and Accountability Act* following that case, purported to validate all grants of financial assistance that did not have their own statute, by listing them in regulations and authorising a Minister or a Chief Executive of an agency or, even, a delegate of the Chief Executive to make, vary or administer any arrangement for any one of these grants of financial assistance, some of which were expressed in such broad language as to virtually constitute a delegation of Constitutional legislative power. And just to rub in the point, the legislation has a specific section which states that this new, comprehensive delegation of power "does not, by implication, limit the executive power of the Commonwealth". I cannot see how it could possibly have done that. Why would you say it?

This history may make some members of the High Court a little peeved. High Court judges don't do anger. From the point of view of the interests of this Association, none of this helps in any future litigation challenging the validity of direct grants to local government, notably the Roads to Recovery Program.

It is not permissible to approach the Constitution on the basis that whatever is in the institutional interests of the Commonwealth must be the law. It is not consistent with the rule of law that the Executive and the Parliament proceed on the basis that an arguable case is good enough, as distinct from a genuine, predominant opinion as to what the law of the Constitution actually is. Furthermore, it is not consistent with the rule of law for the Parliament or Executive of the Commonwealth to act on the basis that an arguable case is good enough if it is unlikely than anyone will challenge a particular program or a law.

I am not saying that that is what is happening. I don't actually know. However, the Commonwealth's approach could be interpreted in that way.

The Constitution is a document which is to be obeyed. It is not an envelope to be pushed. It is well to remember the origins of the "pushing the envelope " metaphor. It is from the field of mathematics, and particularly the field of aeronautics, where it refers to an aircraft being taken to, and even beyond, its altitude and speed limits. That is no way to treat a Constitution.

It may be that the Commonwealth believes that it has improved its position in the High Court with the appointment of the former Commonwealth Solicitor General to the Court. Nothing in the history of such appointments, or in Justice Gageler's career as a lawyer, suggests they can take him for granted. Indeed, he arrives at the Court with an approach to the Constitution which is jurisprudentially innovative and which he has held for a long time.

He has expressed, even before his appointment as Solicitor General, views which are in favour of the Commonwealth position on many matters. He advocated a reduction of judicial intervention with the exercise of both legislative and executive power by changing the principles on which the High Court has acted in the past. However, such intervention could be increased when the Court forms the view that Executive control of Parliament has distorted the Constitutional role of the Commonwealth Parliament.

Justice Gageler's approach is to recognise that the principal constraint inherent in the conferral of judicial power by the Australian Constitution, arises from the primacy which that very Constitution gives to the political processes of responsible government. In his past writings he focused on the strength of the institutional structures of parliamentary democracy. Where political accountability is, as he put it, "inherently strong", the judiciary should defer to the Parliament. However, where political accountability is "inherently weak or endangered", there is a need for judicial vigilance.

A good example of the weakness of political accountability was the control the Executive manifested after the *Chaplaincy* case, by forcing the *Financial Management and Accountability Amendment Act* through the Parliament within 48 hours. The essential character of the Act is that, to a significant degree, it abdicates Parliamentary control of expenditure. No doubt, this is based on the political popularity of the expenditure, or at least most of it, coupled with a sense of urgency. However, this conduct was not consistent with the central significance of such Parliamentary control in the text of our Constitution and in our Constitutional history, not least as manifest in the English Civil War or, to bring the drama home, in the dismissal of the Whitlam Government.

Whatever may have been the need for a temporary stop-gap, this legislation, some of which, in my opinion, is unconstitutional, if left as a permanent feature, will create a very real risk of continued, and quite possibly frequent, disappointment of the Commonwealth's expectations.

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As I have indicated, although the Panel rejected a merely symbolic form of recognition, the symbolic affect of financial recognition should not be underestimated. The insertion of an express reference to local government in Australia's foundational political and legal document will consolidate, and perhaps enhance, the position of local government as the third tier of government in Australia. The long-term effects of that cannot be known, but they can only be positive from the perspective of the members of this Association and your parallel associations throughout Australia. It is, accordingly, understandable why you and your colleagues have invested so much time and effort and energy in pursuing this objective.

One of the matters that was discussed by the Panel which I chaired, was the consequences of a third failed referendum. There can be little doubt that, after 1974 and 1988, a further failure would take the issue off the national agenda for a very long time, perhaps permanently.

A number of members of the Panel formed the view that there was insufficient support at present to give the referendum a high enough prospect of success, even if the pre-conditions set out by the majority

were met. They were concerned that a failed referendum could damage, rather than advance, the interests of local government. They were in favour of delaying any referendum until there was a more substantial effort to build public understanding and to establish a broader base for support before changes were attempted.

Whether to press ahead at this time is a political judgment for the local government community. It appears to me that it made that judgment some time ago and there seems very little reason to change course now. That does not mean that you have grounds to be optimistic.

I am not only a newcomer, but also an outsider to this long campaign. Accordingly, I am hesitant to give you any advice. However, my experience on the Panel has given me some basis for stating some views.

First, we were informed that a stand-alone referendum would cost something in the order of $80 million. I do not think that there is any prospect of a stand-alone referendum. It will either be combined with a national election or it will not happen all. There are obvious difficulties in getting a simple message through the maelstrom of a general election campaign, even a message which, on present indications, all the major national parties will support.

This unquestionably complicates overcoming the major difficulty in any constitutional amendment referendum. The natural instinct of the Australian people is: “When in doubt vote No". The Panel majority appreciated the commitment of the local government community to invest considerable resources and actively campaign in favour of a referendum. Without that there would simply be no prospect of success.

The second issue that will need to be faced, particularly from the leadership of some, perhaps a majority, of States, is the simple proposition in reply that there is no real problem of a practical character. All of the grants, which are presently given directly to local government, can be recycled as grants to the States, on the condition that the funds are passed on to local government.

As I have indicated, the recent stopgap legislation on its face leaves open the possibility for the Commonwealth, by a simple Ministerial

measure, to move a program from the Part of the Act providing for direct grants, to that Part of the Act providing for grants to the States and Territories.

The reply to this line of argument is not dramatic, but needs to be made. The key points, in my opinion, are twofold.

First, the system of direct grants to local government has developed over many years and has become, in many respects, a model of a successful partnership amongst the three levels of government. Years of experience with particular programs suggests that they should be allowed to continue in the manner in which they have developed. Commonwealth State relations are always complex and frequently fraught. It is best not to introduce that dimension into programs, like Roads to Recovery, which are working well.

Secondly, it may be advisable, although this is a matter which will vary from State to State, to take on the State's rights issue head on.

Nothing in what is proposed in any way impinges upon the Constitutional responsibility of the State Parliaments for the form, structure and powers of the local government system – or indeed its existence - within each State. Nevertheless, the fear that the Commonwealth can bypass the States whenever it wants will, no doubt, be seen as disturbing the federal balance of a dual system and, thereby, to further centralise power in the Commonwealth.

This was the principal theme in the "No" cases put forward at the 1974 and 1988 referendums and will clearly be a key argument in any future referendum debate. Indeed, in its submission to the Panel, the Queensland Branch of the Australian Workers Union emphasised this very matter. Other submissions also warned that the Commonwealth may attempt to interfere with State functions by directly funding local government to deliver infrastructure and services that have traditionally been the responsibility of State Governments.

Over the course of several decades, the Australian people have become accustomed to the Commonwealth government pursuing programs that were once regarded as the exclusive preserve of State governments. A case can be made for the proposition that the federal balance, as we once knew it, has already been decisively disturbed.

The focus of attention should now be on how best to deliver programs and services, most relevantly local infrastructure, for the benefit of the nation as a whole.

The ALGA submission to the Panel put it this way:

"Use of direct funding allows the Commonwealth to not only target specific investment to achieve national objectives, but also allows the Commonwealth to establish a direct partnership with councils and to engage directly with local communities rather than operating through the filter of State governments."

There are practical political reasons underlying this approach. As the Panel recognised, there are political advantages for a Commonwealth Government to provide services direct to local government rather than through the States. There is a sound basis for the apprehension that the Commonwealth may be less likely to continue existing programs, or to develop new programs to support the provision of local services, if those political advantages were no longer available.

In addition, the Commonwealth has often sought to implement its own policies and priorities, even when they differ from the policies and priorities of State Governments. In many fields of public expenditure, the Commonwealth now imposes its priorities and determines what is the best way to administer programs.

This argument will not endear you to State Governments or Parliaments. But it is a legitimate proposition to assert that, in our current intergovernmental financial arrangements, there is no reason why the Commonwealth should not be entitled to determine which level of government is best suited to implement a specific program which it is prepared to fund.

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Many of you in this room have been involved in this debate for many years, in some cases for decades. I know Paul Bell is one of those and in view of his announced candidacy to return for another stint as the President of ALGA, he doesn't propose to stop any time soon. No one underestimates the difficulties of success in a constitutional referendum. I can bring you no message of optimism in that respect.

Representatives of this association and similar associations throughout Australia, together with the National Association, have spent a lot of time effort and energy in developing this proposal, which the Panel I chaired endorsed. Obviously there are matters that still need attending to, in order to create a sense of momentum. However, I can see no point in putting this matter off in the hope that the task of succeeding in a referendum becomes easier. I have no reason to believe that further delay will enhance the prospects of a successful referendum in some years time. Delay will simply kill the momentum that you have engendered.

Many of you may take the view that you have come so far and may as well see it through now. If the referendum is rejected then at least this matter will be off your otherwise full agenda and you can redirect the time and resources to other tasks. The pessimists amongst you (perhaps you are the realists) can reasonably come to the conclusion that the sooner you know, one way or the other, the better.